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[Adams v. Coastal Production Operators, Inc.](#), 89-ERA-3 (Sec'y Aug. 5, 1992)

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DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: August 5, 1992
CASE NO. 89-ERA-3

IN THE MATTER OF

RICHARD ADAMS,
COMPLAINANT,

v.

COASTAL PRODUCTION OPERATORS, INC.;
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

Before me for review is the Recommended Decision and Order (R.D. and O.) issued by the Administrative Law Judge (ALJ) in this case which arises under the employee protection (whistleblower) provision of the Federal Water Pollution Control Act (FWPCA or the Act), 33 U.S.C. § 1367(a) (1988).¹ Complainant made a timely complaint to the Department of Labor in which he alleged that Respondent Coastal Production Operators, Inc. (CPO), and another company, Intercoastal Oil Field Fluids (IOFF), violated the Act by discharging him from his employment. The Area Director of the Wage and Hour Administration found that both CPO and IOFF violated the Act and ordered both companies to abate the violation. IOFF did not appeal the Area Director's determination and therefore it is final as to IOFF. *See* 29 C.F.R. § 24.4(d)(3)(i). CPO requested a hearing before an ALJ.

Based upon a thorough review of the entire record before the ALJ, I agree that Complainant should prevail on his claim. I adopt the ALJ's factual findings, as modified below, and credibility determinations. The facts, Respondent's exceptions to the R.D. and O., and the legal analysis are set forth separately below.

BACKGROUND

1. The Facts

Complainant first worked for Respondent CPO as a boat operator in 1986 and was employed on an as needed basis. Tr. 19- 20; R.D. and O. at 3. Complainant was one of two skippers CPO used when its most senior skipper already had an assignment. Tr. 21. At the time at issue, Complainant was skipper of a crew boat operated by CPO under a verbal charter with IOFF, a waste disposal company. Tr. 75, 127; R.D. and O. at 3. In turn, IOFF was under contract to Phillips Petroleum, Inc., to clean up old oil production pits near Port Sulphur, Louisiana. Complainant ferried IOFF employees and equipment in the area of the production pits and the quarterboat on which the IOFF crew ate and slept. Tr. 22-23; R.D. and O. at 3. The area near the pits is marshy and boats are the only means of transportation. R.D. and O. at 5.

On August 6, 1988, Complainant watched an IOFF crew pumping water from an oil production pit into the surrounding water body and saw an oil spill occur. Complainant objected to an IOFF foreman, who repositioned the pump's hose. When the pump continued to discharge oil, Complainant borrowed the personal camera of the captain of a nearby tugboat and photographed the pit and pumping operation. Tr. 24-26; R.D. and O. at 4. After the pump shut down for lunch, the IOFF supervisor confronted Complainant on the quarterboat, asked him for the camera,² and ordered Complainant to leave the job site. Tr. 27, 91-93; R.D. and O. at 5.

Complainant took the crew boat to a Phillips Petroleum platform nearby, telephoned the home of his employer's President, and reached the President's wife. Complainant told her that he had been ordered off the job after photographing an oil spill. Tr. 28. CPO President Jimmy Castalano learned of the oil spill incident from his wife when he returned home in the early afternoon of August 6. Tr. 167-168. In a later telephone call, at about 1:00 or 1:30 p.m., Complainant recounted the events to Castalano, who told Complainant he did not work for CPO any more. Tr. 28; R.D. and O. at 8. In subsequent telephone calls, Castalano, who was about three hours away from Port Sulphur, asked Complainant to wait at the dock until Castalano arrived with a substitute skipper, and offered Complainant a ride home. Tr. 29, 136. Complainant testified that he obtained Castalano's

permission to leave the boat at the dock and to return home with Complainant's brother, who would arrive at Port Sulphur earlier than Castalano. Tr. 30; R. D. and O. at 8, 11.

On the midday trip from the platform to the dock at Port Sulphur, Complainant called the U.S. Coast Guard on the crew boat's radio to report the oil spill. The Coast Guard

operator said he did not have jurisdiction and told Complainant to telephone a different Coast Guard office to make a report. Tr. 30; R.D. and O. at 8. Complainant telephoned the Coast Guard at 3:15 p.m. and reported the oil spill. Tr. 31; R.D. and O. at 8; JX 3.

Castalano arrived at the dock with a substitute skipper between 5:30 and 6:00 P.M. and learned that IOFF believed that Complainant had abandoned the crew without transportation when there was a storm warning. Tr. 137-139. The next day, Castalano telephoned Complainant at his home and, according to Complainant, chastised him for using the boat's radio to call the Coast Guard and for taking photographs of the oil spill. Tr. 31-32; R.D. and O. at 11. During the August 7 phone call, Castalano told Complainant he was fired. Tr. 33.

Castalano testified that Complainant was to work the IOFF job on a seven/seven shift, alternating seven work days with seven days off. Tr. 147. Castalano indicated that CPO had hired a second skipper on five or six days between the end of the IOFF job on September 14 and the hearing on November 28, 1988. Tr. 148.

2. The Recommended Respondent's Exceptions

The ALJ determined that internal reporting of safety violations is protected activity under whistleblower protection statutes and that Complainant's photographing, and complaining to IOFF employees about, the oil spill was a protected internal report. R.D. and O. at 2. The ALJ determined that Complainant made a prima facie case of retaliatory discharge, R.D. and O. at 12, and analyzed Respondent's stated reasons for firing Complainant. R.D. and O. at 6-8; 10-11. Concerning the conflicting testimony on the reasons why Complainant was discharged, the ALJ determined that Complainant's version was more credible and found that Respondent discharged Complainant for reporting the oil spill to the Coast Guard. R.D. and O. at 11. The ALJ ordered Respondent to offer Complainant reinstatement, to remove all references to the incident from Complainant's personnel history, and to pay back pay, interest,

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and a reasonable attorney's fee. R.D. and O. at 12. The ALJ determined that Respondent owed back pay for 19 days. *Id.*

Respondent contends that Complainant did not make a prima facie case of retaliatory discharge because taking photographs is not a protected activity under the Act and, even if it is, the United States Court of Appeals for the Fifth Circuit, whose decisions are controlling in this case, has held that internal complaints are not protected activity. In the alternative, Respondent argues that Complainant did not make a prima facie case because there is no evidence that Respondent was aware of Complainant's external complaint to the Coast Guard at the time of the discharge. Respondent also argues that the ALJ improperly discredited its witnesses' testimony on the ground of hearsay and on the mistaken assumption that certain witnesses had observed Complainant taking

photographs. Respondent takes exception to the ALJ's determination that Complainant's behavior on the job did not merit dismissal and to the statement that Phillips Petroleum admitted the oil spill violation and paid a fine. Finally, Respondent contends that even if Complainant met the burden of persuasion, Respondent does not owe any back pay because CPO had no work for Complainant after IOFF ordered him off the job.

ANALYSIS

1. The Merits

To make a prima facie case, the complainant in a whistleblower case must show that he engaged in protected activity, that he was subjected to adverse action, and that respondent was aware of the protected activity when it took the adverse action. Complainant also must raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

Under the FWPCA,

No person shall fire, or in any other way discriminate against, or cause to be discriminated against, any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

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33 U.S.C. § 1367(a). The referenced chapter governs the discharge into water of pollutants, including oil. *See* 33 U.S.C. § 1321(b)(3).

There is no dispute in this case that Complainant's external complaint to the Coast Guard is protected activity under the Act. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (protection afforded during all stages of participation in order to maintain integrity of administrative process in its entirety). Respondent contends, however, that Complainant did not make a prima facie case concerning the Coast Guard report because there was "no evidence" that CPO President Castalano was aware of the report when he fired Complainant. To the contrary, Complainant testified that when he was officially fired on August 7, Castalano stated that Complainant should not have used the boat's radio to call the Coast Guard. Tr. 31. According to Castalano, they discussed Complainant's abandoning the IOFF crew. Tr. 142- 143. The ALJ judged that Complainant's version was more credible and concluded that Castalano fired Complainant for reporting the oil spill to the Coast Guard. R.D. and O. at 11.³ Therefore, I find that Complainant established a prima facie case based on the external complaint.

Citing *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), Respondent argues that Complainant's prima facie case failed for the additional reason that photographing an oil spill is at most an "internal" complaint and is not protected activity under the Act in cases governed by the decisions of the Fifth Circuit. I disagree. The other circuits that have considered the question have held or stated, either explicitly or implicitly, that internal complaints are protected under whistleblower provisions in analogous statutes. See *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991) (explicit); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (implicit); *Kansas Gas & Elec.*, 780 F.2d at 1513 (explicit); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (explicit); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (implicit).

I continue to be persuaded that reporting violations internally is a protected activity and that *Mackowiak* and *Kansas Gas & Elec.*, rather than *Brown & Root*, set forth the appropriate resolution of this issue. For the reasons set forth more fully

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in *Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 5-10, *appeal docketed*, No. 92-4576 (5th Cir. June 1, 1992), and *Willy v. The Coastal Corp.*, Case No. 85-CAA-1, Sec. Dec., June 4, 1987, slip op. at 3-4, 8, I respectfully decline to follow the *Brown & Root* decision. As an alternative holding, for purposes of this case, I hold that Complainant engaged in protected activity when he made an internal complaint to responsible IOFF personnel about the oil spill.⁴ I find that Castalano knew about Complainant's objection to IOFF when he fired Complainant, Tr. 167-168, and that Complainant made a prima facie case of retaliatory discharge based on the internal complaint.⁵

Once Complainant established a prima facie case, the burden shifted to Respondent to articulate legitimate, nondiscriminatory reasons for the discharge, *Dartey*, slip op. at 8, and Respondent did so. The Complainant had the ultimate burden of persuading that the articulated reasons were a pretext for discrimination, either by showing that the unlawful reason more likely motivated Respondent or by showing that Respondent's proffered explanation is unworthy of credence. *Id.*

Respondent maintains that the ALJ improperly discredited some of the testimony of witnesses Johnson and Ponville as hearsay because they gave the testimony to show their state of mind, not the truth of the matter asserted. Respondent's argument is directed at whether the testimony technically was hearsay under the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges. See 29 C.F.R. § 18.801(c) (1991), defining "hearsay." Having allowed the testimony, the ALJ properly determined what weight to give it.

Another asserted error is the ALJ's assumption that Respondent's witness Ponville, the IOFF foreman at the oil pit operation, was present when Complainant took the

photographs. Ponville testified that although he started the pump and repositioned the hose, he left the pit area prior to the picture taking. Tr. 173-174. A different IOFF employee was operating the pump when Complainant took the pictures. The ALJ's misunderstanding of Ponville's testimony was not critical to his decision, however, because IOFF supervisor Johnson knew about the pictures when he ordered Complainant off the job, and Castalano knew about them when he fired Complainant.

Respondent contends that the ALJ did not have authority to "second guess" CPO's business judgment that Complainant had

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committed infractions serious enough to merit dismissal. The ALJ's statement that "while there may be a basis for employee disciplinary action, there are insufficient grounds for summary dismissal," R.D. and O. at 8, was not an impermissible interference in legitimate business decisions. Rather, after agreeing with Respondent that Complainant did commit some infractions, the ALJ was assessing whether the asserted infractions credibly would have led to Complainant's discharge. The ALJ determined that IOFF and CPO accorded "significance" to the infractions only after Complainant's termination, R.D. and O. at 7 and 8, and therefore he did not believe that the infractions were a true reason for the discharge.

The record supports the ALJ's ultimate judgment that Castalano's stated reasons for dismissing Complainant were pretextual. The ALJ determined that abandoning the IOFF crew without transportation was not a credible reason because neither IOFF personnel nor Castalano testified that they clearly ordered Complainant to stay with the boat until his replacement arrived. As the ALJ noted, R.D. and O. at 9, IOFF supervisor Johnson testified that he "felt" Complainant had agreed to wait for the replacement skipper. Tr. 96. Castalano said that "he was trying to get Complainant to stay there and just wait until [Castalano] brought the relief skipper. . . ." Tr. 136 (emphasis added). And contrary to the notion that the IOFF crew was left without transportation, the testimony revealed that there were other boats in the area, including a flat-bottomed fishing boat, Tr. 94, a Phillips Petroleum crew boat, Tr. 98, and a slow moving tugboat, Tr. 98. Moreover, the ALJ credited Complainant's testimony, including the statement that he initially learned he was fired during a telephone call on the afternoon of August 6. The August 6 telephone call occurred before Complainant left the area near the production pits and therefore it also occurred before any alleged abandonment of the crew.

Similarly, the record supports the ALJ's assessment that leaving the boat and equipment unattended was not a credible reason for the discharge. Complainant's uncontradicted testimony established that CPO routinely left its boats unattended and unlocked overnight at public docks in high theft areas. Tr. 191. In this case, Complainant left the boat unattended for at most a few daylight hours between the time Complainant left the dock and the time his replacement arrived, and Complainant testified that he had Castalano's permission to do so.

Finally, the "interference with work crews" basis for discharging Complainant is not supported by the record. The ALJ

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correctly noted that in the earlier incidents about which Castalano testified, no work crew members complained about Complainant interfering. R.D. and O. at 10. Although Castalano had admonished Complainant on other occasions not to interfere with work crews on the job, Tr. 129, Castalano fired Complainant only after he "interfered" by objecting to an oil spill, photographing it, and reporting it to the Coast Guard. Even Respondent's witnesses acknowledged that taking photographs around an oil field job was risky behavior, Tr. 115-116, and that a worker who cares to keep his job would not report an oil spill to the Coast Guard without first reporting it to his employer. Tr. 186-187.

In light of Complainant's testimony that Castalano mentioned calling the Coast Guard and taking photographs when Castalano officially fired Complainant on August 7, and the testimony of Respondent's witnesses that an employee who takes pictures or reports an oil spill to the Coast Guard would be imperiling his job, there is ample record evidence supporting the ALJ's determination that Castalano fired Complainant for engaging in protected activity. I find that Complainant met the burden of persuading that the proffered reasons for firing him were pretextual.

2. The remedy

Respondent contends that even if Complainant established a violation of the employee protection provision, it does not owe complainant any back pay, because CPO had no work for Complainant after IOFF legitimately ordered him off the job on August 6. But the Area Director's finding that IOFF violated the whistleblower provision of the Act is final as to IOFF, and forecloses Respondent from arguing that Respondent could not have assigned Complainant to the IOFF job after that date. *See Palmer v. Western Truck Manpower, Inc.*, Case No. 85-STA-16, Sec. Dec. on Remand, Mar. 13, 1992, slip op. at 3-6, *appeal docketed*, No. 92-70231 (9th Cir. Apr. 13, 1992) (joint employer that has not knowingly participated in other employer's violation of employee protection provision of Surface Transportation Assistance Act may be held liable for unlawful discrimination); *Hill & Ottney v. Tennessee Valley Authority*, Case Nos. 87-ERA-23 and 87-ERA-24, Sec. Dec. and Order of Remand, May 24, 1989, slip op. at 2-4 (under analogous employee protection provision, respondent may be liable for discrimination against employees of a contractor). Accordingly, the period between Complainant's discharge

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(August 6, 1988) and the end of the IOFF job (September 14, 1988) should be included in the back pay calculation.

Complainant has the burden of establishing the amount of back pay that Respondent owes. Complainant testified that he expected to work the IOFF job for its duration and often worked jobs for more than seven days in a row. Tr. 70. Castalano testified that Complainant was to work a seven and seven shift on the IOFF job: seven days on followed by seven days off. Tr. 147. In post hearing submissions to the ALJ, both Respondent (Employer's Post-Hearing Brief at 19) and Complainant (Claimant's Post-Hearing Memorandum (P.H. Mem.) at 17) agreed to use a seven/seven shift for calculating the number of days Complainant would have worked. I will treat the statements in the two post hearing briefs as a stipulation to calculate back pay using a seven/seven shift for the duration of the IOFF job. *Cf. Nunn v. Duke Power Co.*, Case No. 84-ERA-27, Sec. Ord. of Dis., Sept. 29, 1989, slip op. at 3-4 (separate documents treated as stipulation of dismissal). The parties also stipulated that Complainant earned \$80 per day. Tr. 5.

I find that, under the agreed seven/seven shift, Complainant would have worked a total of 23 days on the IOFF job.⁶ Since Complainant was paid for 4.5 days (JX 5), I calculate that Respondents owe Complainant back pay for 18.5 days for the period August 6 through September 14, 1988.

The ALJ ordered Respondent to offer Complainant reinstatement to his former position and tenure, but did not address Complainant's request, P.H. Mem. at 18, for back pay after the end of the IOFF job. Castalano testified, Tr. 148, that he needed to hire a second skipper on five or six days between the end of the IOFF job and the hearing. This was not contradicted so I find that Respondent owes Complainant back pay for an additional six days. *See Asst. Sec. and Moravec v. HC & M Transportation, Inc.*, Case No. 90-STA-44, Sec. Final Dec. and Ord., Jan. 6, 1992, slip op. at 21, *appeal docketed*, No. 92-70102 (9th Cir. Feb. 18, 1992) (uncertainties in determining what a complainant would have earned absent the discrimination are resolved against the discriminating employer); *accord, Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-261 (5th Cir. 1974). I will remand to the ALJ to take evidence on the number of days Complainant would have worked for CPO as the second skipper, during the period beginning the day after the hearing and ending with reinstatement (or declination). Absent further stipulation, the parties should address whether a seven/seven

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shift is the correct basis to calculate Complainant's constructive work days for periods since September 14, 1988, during which Respondent employed a second skipper.

On remand the ALJ shall address the issues identified here, and these and any additional issues affecting the calculation of back pay, including interest thereon, should be examined in light of other decisions discussing damages in whistleblower cases.⁷

The ALJ did not address Complainant's request for attorney's fees submitted following issuance of the R.D. and O. On remand the ALJ also shall consider this issue and make a

recommendation on an appropriate award. 33 U.S.C. § 1367(c); *see also, e.g., Goldstein v. Ebasco*, slip op. at 18-28; *Blackburn v. Metric Constructors, Inc.*, Oct. 30, 1991, slip op. at 23-24. On remand, Complainant may submit a further fee request covering the work while this case has been before the Secretary.

ORDER

Pursuant to 33 U.S.C. § 1367(b) and (c) and 29 C.F.R. § 24.6(b), it is ORDERED that:

1. Respondent Coastal Production Operators, Inc., shall offer Complainant reinstatement to his former or a comparable position and tenure; remove all references concerning this incident from Complainant's personnel history; refrain from use of this incident as a basis for an unsatisfactory employee evaluation; and refrain from reference to this incident as a basis for termination, or an unsatisfactory rating for future employment references.

2. Respondent shall pay Complainant 24.5 days back pay at \$80.00 per day for the period from August 6, 1988, through November 28, 1988, with interest thereon calculated pursuant to Section 6621 of the Internal Revenue Code. *Wells v. Kansas GAS & Elec. Co.*, slip op. at 17 and n.6.

3. This case is remanded to the ALJ to determine the additional back pay owed to Complainant from November 29, 1988 to the date of reinstatement (or declination). On remand the ALJ also shall rule on Complainant's 1989 petition for attorney's fees and costs, afford Complainant an opportunity to submit a petition for costs and expenses, including attorney's fees, incurred since the 1989 attorney's fees petition, afford Respondent time to respond to any new petition, and rule on any

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such new petition.

It is anticipated that the ALJ will be able to complete this further review and submit a supplemental recommended decision and order within 90 days.

SO ORDERED.

Lynn Martin
Secretary of Labor

Washington, D.C.

[ENDNOTES]

¹The Office of Administrative Law Judges assigned this case an ERA docket number and the ALJ labelled the parties "Claimant" and "Employer." The party designations are hereby conformed to comport with the usual practice in whistleblower cases. Although this case does not arise under the Energy Reorganization Act, the "ERA" designation in the docket number is adhered to for record keeping consistency.

²Complainant had returned the camera to the tugboat captain who owned it. Tr. 25. Respondent's witness, IOFF supervisor Johnson, testified that he saw a Phillips Petroleum pollution consultant remove the film from the tugboat captain's camera, that the consultant had the film developed, and that "nothing came out." Tr. 114.

³The ALJ made several credibility determinations and in each instance he found Complainant's version of the facts to be more believable than that of Respondent's witnesses. *See, e.g.*, R.D. and O. at 12: "In contrast with Claimant's testimonial and documentary evidence, I found the Employer's witnesses unreliable and for the most part lacking credibility." Concerning whether Castalano fired Complainant for reporting the oil spill to the Coast Guard, as Complainant testified, or for abandoning and interfering with the IOFF crew, as Castalano testified, the ALJ fully explained why he believed Complainant. *See* R.D. and O. at 11: while there was no documented prior history of personnel problems with Complainant, there was a very close time sequence within which Complainant photographed and complained about the oil spill, was relieved by IOFF, reported the oil spill to the Coast Guard, and was fired by Castalano. An additional review of the record before me fully supports the ALJ's judgment.

⁴Although Complainant did not work for IOFF directly, and hence his complaint to IOFF personnel could be deemed "external" to his employment, the Fifth Circuit defines external complaints as "the employee's contact or involvement with a competent organ of government" *Brown & Root*, 747 F.2d at 1036. Under that analysis, Complainant's objection to IOFF personnel was an internal complaint. Complainant objected orally and openly took photographs, further demonstrating to supervisors on the scene his objection to the spill. In the context of this case, taking the pictures was an aspect of Complainant's objection and thus was protected.

⁵Respondent is correct that the ALJ erred in stating that Phillips Petroleum, Inc., admitted violating the FWPCA and paid a \$5,000 fine for the oil spill. R.D. and O. at 11. Rather, the record is silent as to Phillips Petroleum's response to a Coast Guard "Water Pollution Violation Report" for which the potential penalty was \$5,000. In any event, the misstatement is not material because to be covered under the employee protection provision, a complaint need only be grounded in conditions constituting a reasonably perceived violation of the underlying act. *See Johnson v. Old Dominion Security*, Case No. 86-CAA-3, et seq., Sec. Dec., May 29, 1991, slip op. at 15; *Aurich v. Consolidated Edison Co.*, Case No. 86-ERA-2, Sec. Rem. Order, Apr. 23, 1987, slip op. at 4; *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992).

⁶In calculating the number of days of back pay for the duration of the IOFF job, the ALJ incorrectly relied upon the Area Director's determination. R.D. and O. at 12. In this de

novo proceeding, I have not considered the Area Director's determination except to note that it is final as to IOFF. The record before the ALJ reveals that under a seven/seven shift, Complainant would have worked August 2 - 8, August 16 - 22, August 30 - Sept. 5, and Sept. 13 - 14, for a total of 23 days.

⁷See, e.g., *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Dam. and Att'y Fees and Remand, Oct. 30, 1991, slip op. at 11-14, *appeal docketed*, No. 91-2385 (4th Cir. Dec. 20, 1991); *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, et seq., Sec. Dec., May 29, 1991, slip op. at 23- 24; *Wells v. Kansas Gas & Elec. Co.*, Case No. 85-ERA-22, Sec. Dec., Mar. 21, 1991, slip op. at 17, *appeal dismissed*, No. 91- 9526, (10th Cir. Aug. 23, 1991). See also B. Schlei and P. Grossman, *Employment Discrimination Law*, Five-Year Cum. Supp., Ch. 38 at 540 and n.86 (2d ed. 1989).